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In United States Supreme Court,

October Term. 1902.

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THE HOME LIFE INSURANCE COMPANY, OF NEW YORK, PLAINTIFF IN ERROR.

vs.

A. A. FISHER, AS EXECUTOR OF ALEXANDER SUTER MACLEAN, DEFENDANT IN ERROR.

In Error to United States Circuit Court for the Northern District of Florida, at Pensacola.

Brief of WILLIAM A. BLOUNT, Attorney for Plaintiff in Error.

E. O. WHITE, PRINTER, PENSACOLA, FLA.

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STATEMENT.

On December 21, 1899, defendant in error brought suit in the court *a quo* against the plaintiff in error. In his delaration (page 3 record) he alleged:

That on August 28, 1899, plaintiff in error issued to his testator, Alexander Suter Maclean, its policy of insurance upon his life for $5000.00, he being the beneficiary therein. That on October 16, 1899, Maclean died. That defendant in error duly qualified as Executor and received letters testamentary upon Maclean's estate. That he made due proofs of his death, and the plaintiff in error received them, but that the plaintiff in error refused to pay the amount alleged to be due upon the policy.

The defendant in error sued for $5000.00 (less unpaid premiums due for the current year) and interest and attorneys' fees allowed by the statute of the State of Florida.

To the declaration (and an amendment) were attached copies of the policy, of the application by Maclean for the

policy, of the declaration made by Maclean to the medical examiner, and of the medical examiner's report.

To this declaration the plaintiff in error filed twenty-seven pleas.

It is unnecessary to state the contents of all of them. Demurrers to eighteen of them were sustained; five were withdrawn, and the cause was tried upon issues made on four of them.

The error committed by the court below in sustaining the demurrers to the pleas were identical as to many of them; therefore, we have contented ourselves with selecting types of each class of pleas as those upon which we assign error.

The pleas thus selected are:

1. The first, third and twenty-third, which allege that the testator, Maclean, in his application for the policy in suit, made certain statements which were warranties, and which were untrue.

2. The fourth and sixth, which allege that the testator, Maclean, in the said application made certain statements which were representations which were material to the risk assumed by plaintiff in error in issuing the policy, and which were untrue.

3. The seventh, eighth and ninth, which were like the fourth and sixth except that they allege the manner in which the representations were material.

To each of these pleas, the defendant in error filed demurrers which were sustained.

The first class of questions before this court arises upon the propriety of sustaining these demurrers.

After the demurrers were disposed of against plaintiff in error, it filed four other pleas, the seventeenth, twenty-first, twenty-sixth and twenty-seventh. The first three were like the fourth and sixth above mentioned, except that they alleged that the plaintiff in error was induced by the answers of Maclean, to issue the policy. The twenty-seventh was a plea of non-assumpsit. The defendant in error took issue on all of these and filed special replications to the seventeenth, twenty-first and twenty-sixth, which replications alleged in substance that the plaintiff in error informed Maclean that it would not rely upon the statements made by him in his application or declaration to the

medical examiner, but upon information derived by plaintiff in error from persons and sources other than Maclean, and that thereafter Maclean understood that his representations were not relied upon, and acted upon that understanding. Plaintiff in error took issue upon this replication.

Trial was had on these issues, and the court refused to give several instructions requested by plaintiff in error, and gave instructions asked by defendant in error, all of which was duly objected and excepted to by plaintiff in error. These rulings are set out in the assignments and bill of exceptions, and need not be here set out *in extenso*.

Upon these arises the second class of questions before the this court.

During the course of the trial, the defendant in error sought to prove the value of the services of his attorneys in this suit in order that he might recover such fees against the plaintiff in error. He relied upon a statute of the State of Florida (set out in appendix hereto) permitting such recovery. The plaintiff in error objected to such proof because such statute contravened the fourteenth amendment to the Constitution of the United States in that it deprived insurance companies, including defendant, of their property, without due process of law, and in that it deprived insurance companies, including defendant, of the equal protection of the laws.

The court overruled the objection and the defendant excepted.

This ruling presents the third question to be decided by this court, and involves the federal question which confers jurisdiction upon the court.

The jury found a verdict for plaintiff for principal, interest and attorneys' fees, aggregating $5903.79.

Assignments of Error.

We do not set out nor discuss all the assignments of error. While we think them all good (except, perhaps, the ninth and tenth,) yet, many of them present practically the same question, and we therefore limit the number set forth and discussed to the number of distinct substantive questions presented.

Assignment Number One.

This assignment is:

"That the court erred in sustaining the demurrer to plea numbered one, filed January 28, 1901."

The plea referred to therein is plea one, page seventeen. The demurrer is on page twenty-three, and the order sustaining the demurrer is on page twenty-five.

Assignment Number Two.

This assignment is:

"That the court erred in sustaining the demurrer to the plea numbered three, filed January 28, 1901."

The plea referred to is on page eighteen; the demurrer thereto is on page twenty-four, and the order upon the demurrer is on page twenty-five.

Assignment Number Three.

This assignment is:

"That the court erred in sustaining the demurrer to the plea numbered twenty-three, filed March 15, 1901."

The plea referred to is on page thirty-six; the demurrer thereto is on page thirty-nine, and the order upon the demurrer is on page forty-one.

Assignment Number Four.

This assignment is:

"That the court erred in sustaining the demurrer to the plea numbered four, filed January 28, 1901."

The plea referred to is on page eighteen, the demurrer thereto is on page twenty-four and the order upon the demurrer is on page twenty-five.

Assignment Number Five.

This assignment is:

"That the court erred in sustaining the demurrer to the plea numbered six, filed January 28, 1901."

The plea referred to is on page nineteen; the demurrer thereto is on page twenty-four, and the order upon the demurrer is on page twenty-five.

Assignment Number Six.

This assignment is:

"That the court erred in sustaining the demurrer to the plea numbered seven, filed January 28, 1901."

The plea referred to is on page nineteen; the demurrer thereto is on page twenty-four, and the order upon the demurrer is on page twenty-five.

Assignment Number Seven.

This assignment is:

"That the court erred in sustaining the demurrer to the plea numbered eight, filed January 28, 1901."

The plea referred to is on page twenty; the demurrer thereto is on page twenty-four, and the order upon the demurrer is on page twenty-five.

Assignment Number Eight.

This assignment is:

"That the court erred in sustaining the demurrer to the plea numbered nine, filed January 28, 1901."

The plea referred to is on page twenty; the demurrer thereto is on page twenty-four, and the order upon the demurrer is on page twenty-five.

Assignment Number Nine.

This assignment is:

"That the court erred in permitting the witness, John Eagan, to testify as to what would be a reasonable fee for the plaintiff to recover as his attorneys' fees in this cause as a basis for such recovery against the defendant, as set forth in the first exception of the bill of exceptions."

All the testimony relating to any of the exceptions is found in the third to seventh exception inclusive (pp. 47 to 57 of the transcript) and is so short and so easy of reference that it is deemed unnecessary to insert it under any of these assignments in this brief.

Assignment Number Thirteen.

This assignment is:

"That the court erred in refusing to deliver in charge to the jury the special instruction asked by the defendant

numbered nine, as set forth in the fifth exception of the bill of exceptions, to-wit:

"9. Any habit of drinking spirits by Maclean was material, if it was to such an extent that according to the course and practice of life insurance companies generally it would have led to the rejection of the risk if it had been known to the defendant before the issuance of the policy."

This charge and the refusal to give the same is set forth in the fifth exception, together with the testimony relating thereto (p. 54 of the transcript.)

Assignment Number Eighteen.

This assignment is:

"That the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered eleven, as set forth in the tenth exception of the bill of exceptions, to-wit:

11. The court instructs you that in cases where the question of temperance or intemperance is involved, there is no sharp line of distinction, and in reference to that much is left to the discretion and judgment of the jury and in connection therewith, the jury is authorized to consider the reasonable understanding and the belief of the assured."

The exception ten referred to in this assignment is to be found on page 59 of the transcript, but it adds nothing to the assignment except to show that the plaintiff in error excepted

Assignment Number Twenty-Two.

This assignment is:

"That the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff numbered eighteen, as set forth in the fourteenth exception of the bill of exceptions, to-wit:

18. The law is, and the court so instructs you, that when an insurance company issues a policy without requiring an answer to an interrogatory contained in the application or declaration made in connection therewith, it is fair, and you have a right to infer that the company waived information upon that point."

The fourteenth exception referred to therein is to be found on page 60 of the transcript.

ARGUMENT.

We take up out of its order the ninth assignment of error because upon this depends the jurisdiction of the court and because it is the only one of those above set forth upon which we do not insist except as the means of invoking the aid of this court.

Ninth Assignment.

This assigns error in the court below in deciding that a statute of the State of Florida which permits plaintiffs successfully suing insurance companies upon policies of insurance to recover attorneys' fees in addition to amounts recovered upon the policy.

See Statute in Appendix.

At the time of raising the question in the court below and at the time of suing out the writ of error herein, the plaintiff in error relied upon cases which either directly or indirectly decided that such a provision is in conflict with the fourteenth amendment of the Constitution of the United States.

Phœnix Ins. Co. vs. Hart, 112 Ga. 765;

Williamson vs Liverpool L. & G. In. Co. 104 Fed. p. 32;

Gulf, C. & S. F. R. R. Co. vs. Ellis, 165 U. S. 150; and cases cited in these.

Since suing out the writ of error in this cause, and the lodging of the record here, this court has decided that such a statute does not contravene that constitutional amendment.

Fidelity & Mutual Life Ins. Co. vs. Mettler, 185 U. S. 308.

This decision, of course, prevents any further discussion of that question.

The court, however, in the same and previous cases decides that even if the contention of the plaintiff in error as to the invalidity of the statute be not well taken, yet that it raises a federal question and the court will consider all the other questions in the record. We therefore proceed to consider the other assignments of error.

Assignment Number One.

This assignment is:

"That the court erred in sustaining the demurrer to plea numbered one, filed January 28th, 1901."

The plea demurred to is:

"1. That the defendant required of the said Alexander Suter Maclean that he should, prior to, and as a condition of the issuance of the policy of insurance sued upon, make and sign an application to this defendant for the issuance of the said policy. That he did make, sign and deliver to the defendant such application and offered therein the statements and answers in it contained as a consideration for, and as a basis of, a contract with the defendant, under any policy issued upon said application. A copy of said application is annexed to the declaration. That, by the terms of the policy of insurance sued on the application became a part of the said contract of insurance. That in and by said application the said Alexander Suter Maclean warranted on behalf of himself or of any person who should have or claim any interest in any policy issued upon the said application, that the statements and answers in said application were true, full and complete; that in answer to question "9a" in said application, to-wit:

"9a.' "Do you drink wines, spirits or malt liquors?" he answered, "Yes"

And in answer to question "9b" in said application, to-wit:

"9b." If so, which of these, and to what extent?" he answered, "Moderately."

The defendant avers that the said answer was not true, full and complete, because at the time that he made said answer, he had a habit of drinking spirits more than moderately.

The demurrer to the plea is as follows:

"1. Said plea does not, when taken with the admitted allegations of the declaration, show a warranty.

2. It appears that plaintiff's testator stated his estimate of his own habits, and that defendant waived any further disclosure touching the same.

3. It appears that defendant left the matter inquired about to be answered according to plaintiff's testator's opinion, and it does not appear that said testator did not state his honest opinion.

4. It does not appear that defendant in issuing said policy relied upon the answers of said testator to said questions.

5. It appears that in issuing said policy the defendant

did not rely upon the answers of said testator to said questions.

6. It appears that the said defendant is estopped from making the said defense because it appears that said testator was advised by defendant, or by its procurement, that his answers would not be taken as a basis for the issuance of the said policy; but yet that the policy was issued by defendant and premiums therefor received by it from said testator; and, hence defendant will not be permitted to avoid its liability upon said policy upon the ground that said answers were untrue, without alleging that said testator was informed that the policy was issued on the faith of said answers.

7. Said plea is otherwise bad and insufficient in law."

The order sustaining the demurrer is found on page 25 of the transcript.

A proper disposition of this demurrer enables us to dispose of most of the other questions in the record and we therefore discuss the grounds *seriatim* and some what at length.

Ground one of demurrer to the first plea is as follows:

"1. Said plea does not, when taken with the admitted allegations of the declaration, show a warranty."

The plea sets up a warranty and a breach thereof. The demurrer says that the policy and the papers preliminary thereto (the application of the deceased, his declaration to the medical examiner and the medical examiner's report attached to and made a part of the declaration) do not show any warranty.

The court sustained this ground of the demurrer upon the authority of Moulor vs. American Life Ins. Co.; 111 U. S. 335, and cases following the principles of that case We think that we can demonstrate:

1. That the contract in suit contained the warranty relied upon by defendant.

2. That neither the Moulor case nor any other case decides otherwise.

3. That this court has never applied the principles of the Moulor case to one like the case at bar, and that the cases, State and Federal, involving contracts like this and citing the Moulor case, distinguish it from cases like this.

1. The plaintiff in error draws the warranty from the

following parts of the papers attached to the declaration and relied upon in the plea;

The questions and answers in the application:

"9a. Do you drink wines, spirits or malt liquors?"

Answer. "Yes," (page 8, of the transcript.)

"9b. If so which of them and to what extent?"

Answer. "Moderately," (page 8, of the transcript;)

The warranty in the application following the questions and answers;

"I warrant on behalf of myself and of any person who shall have or claim any interest in any policy issued under this application, that all of the foregoing statements and answers are true, full and complete, and are offered to the company as a consideration for and as the basis of the contract with said company under any policy issued under this application;"

The renewal of this agreement in the declaration to the medical examiner in the following words:

"I hereby declare that the accompanying application to the Home Life Insurance Company for an insurance on my life dated August 29th, 1899, was signed by me and that I renew my agreement therein;"

The incorporation of these statements and agreements into the policy as follows:

"THE HOME LIFE INSURANCE COMPANY

* * * * * * * *

By this policy of insurance in consideration of the statements and agreements made in the application for this policy which are hereby made a part of this contract * * * * does promise and agree to pay five thousand dollars to Alexander Suter Maclean, his executors, administrators or assigns immediately upon receipt and approval of proofs of death, etc."

The court below, upon the demurrer, decided that these "statements and agreements" did not constitute a warranty. That the court erred, seems clear.

The word warranty in insurance is but a convenient word to express a contractual relation which is entered into sometimes by the use of the words "warrant" or "warranty," but which may as well be created by the use of other words declaring entry into such contract, or by such use of other words as to necessarily imply the entry into such contract.

The contract is the contract of the assured that a given state of facts is or has not existed, does or does not exist, or shall or shall not exist. If he contracts that his statements, no matter what form they may take, are true, then such statement constitutes a warranty. At this day such a contract is usually contained in the word "warrant" (which in this sense means nothing more than "formally contract,") but even now there are frequently used the words "agree" "contract" "covenant" and other equivalent terms which indicate a clear design on the part of the assured to make his statement a part of the contract, so that if it be untrue, the contract is broken.

It follows necessarily that if the untruth of a statement breaks the contract, the untruth of any part of it has the same effect, and hence the rule that no matter how immaterial the statement may seem to be, or how small its departure from the truth, the breach is complete, which is equivalent to saying that any fact warranted must be literally true. The warranty rests wholly upon the contract and it is incumbent upon the party relying upon it to show the contract.

This distinction necessarily implies that all assertions and statements of the assured entering into the negotiation for insurance not a part of the contract must have another name and a different effect. We therefore find that as a matter of convenience such outside matters are called representations and that the untruth of them is not destructive of the rights of the assured and those holding through him, unless they be not only untrue, but of a matter material to the risk. The reason is obvious. The parties not having contracted about it the effect of the untruth must be found in another of the great branches of the law, i. e., of the law of tort, and under the most elementary principle of such law no one can complain against whom a fraud has been committed unless he be injured by it, and there can be no injury to an insurer arising out of the untruth of the assertion made to it by the insured, unless the untruth be as to a matter material to the risk.

These principles are now elementary, but our excuse for repeating them is that at least one learned judge, the judge below, has ignored them. Under the same excuse we verify them by a citation of the following definitions and authorities:

Justice Clifford says:

"When the policy contains a clause declaring that the application forms a part of the contract all the material statements in the answers of the applicant are thereby changed from representations into warranties."

And again

"When the representations of the insured are expressly referred to in the policy as forming a part of the contract, they will acquire the character of warranties and invalidate the insurance, unless strictly complied with, whether they are or are not material to the risk assumed by the insurer."

Eddy St. John Foundry vs. Hampden, etc., 1 Cliff., 300; Fed. Cas. No. 4277.

May on Insurance under a discussion of what a warranty is, thus states the doctrine:

"Usually the application, proposals, conditions annexed and by-laws are referred to in the policy itself, or they are declared to be the basis upon which it is made, or the policy is declared to be issued upon the faith thereof. When this is the case of course there is no room for doubt." Sec. 158.

And again:

"As a rule when the application is referred to as forming a part of the contract, the statements therein contained are held to have the force and effect of warranties." Sec. 159.

"The main distinction between a warranty and a representation is that while the former is an agreement constituting a part of the contract, the latter is but a statement incidental thereto, is to be carefully observed as it carries with it important consequences. A warranty enters into and forms a part of the contract itself." Sec. 183.

Lord Eldon says:

"It is the first principle of the law of insurance that a warranty is a part of the contract that the matter is such as it is represented to be; the materiality or the immateriality signifies nothing; the only question is as to the mere fact." 58 Ark 528

In Cushman vs. Ins. Co. 70 N. Y. 72, it was decided:

"That the application for the insurance was a part of the policy and that the answers to the questions therein contained were therefore warranties."

2. The case of Moulor vs. Am. Life Ins. Co. 111 U. S. 335, does not decide otherwise.

The court below based its decision upon the ground that in this case, as in that, the word "warranty" while found in the application was not carried forward into the policy, and that in this case the word "statement" was used in the policy, to which it gave the same effect as this court gave to the word "representations" used in the policy in that case.

We apprehend, however, that we can demonstrate that this policy is very different from that, so far as this question is concerned.

That case is distinguishable from this in the fact that there the warranty was that the answer should, among other things, be "fair," not "evasive," nor "misrepresentations," that the causes rendering insurance on the assured's life void should be "known causes" and the policy spoke of the "representations" made in the application. The court found, applying the well known rule of construction against insurance companies which prepare the policies, that these provisions not only indicated no contractual obligation upon the assured, that his statements should be true, but that as representations his obligations only extended to the existence of good faith on his part because the terms of the application implied that the policy was not to be annulled unless the cause of disease inquired about was "known" to him, or unless his answers were "unfair," or "evasive" or "concealments," all of which implied the absence of good faith.

In the case at bar the circumstances are similar in only one respect, i. e., that the word "warranty" is not found in the policy itself.

It is not necessary that this word should appear in the policy, as we have shown and as appears in the cases hereinafter cited as commenting upon and distinguishing the Moulor case and as appears in the Moulor case itself.

Moulor vs. Am. Life Ins. Co. 111 U. S. p. 342.

See also Aloe vs. Mutual, etc. Asson. 147 Mo. 575.

In the Moulor case the absence of the word "warranty" from the policy was evidently not, but the substitution for it of the word "representations" was, the determining feature with this court, and the court held that this latter word in conjunction with the other provisions which we have quoted controlled the word "warranty" in the application

In the case at bar the application distinctly warranted

the truth of the answers and the policy as distinctly made the statements and agreements in such application a part of the policy. There is no word qualifying the explicitness of these contractual provisions and we have found no case in which such provisions were not held to be a warranty.

3. That this court did not intend in the Moulor case to impugn the general rule that if there be a warranty or contract of the truth of any statements in the application and the application be incorporated into the policy by reference or otherwise, there is a warranty, and that it decided the Moulor case upon the peculiar language of the policy and the application therein, is amply shown by its approval in that case of cases inconsistent with any such intent, by its own subsequent application of the general rule and by the consensus of subsequent decisions of Federal and State courts that there was no such intent.

It approved (p. 341) the cases of

Jeffries vs. Life Ins. Co. 22 Wall. 47;

Etna Life Ins. Co. vs. France, 91 U. S. 510.

In the former case the policy provided that the insurance was accepted upon the faith that the statements and declarations in the application were true and this court held such statements and declarations to be warranties.

In the latter case, the policy declared that the application was the basis of the contract and a part and parcel of the policy and that the untruth of the statements in the application should avoid the policy and this court made the same ruling as in the Jeffries case.

This court also applied the general rule in Imperial Fire Ins. Co. vs. Coos County, 151 U. S. 463, where it said

"But the rule is equally well settled that contracts of insurance like other contracts are to be construed according to the sense and meaning of the terms which the parties have used and if they are clear and unambiguous their terms are to be taken and understood in their plain and ordinary and popular sense."

And where it quoted with approval the language of the Court of Appeals of New York as follows:

"These conditions when plainly expressed in a policy are binding upon the parties and should be enforced by the courts if the evidence brings the case clearly within their meaning and intent. It tends to bring the law into disrepute when by astute and subtle distinctions a plain case

is attempted to be taken without the operation of a clear reasonable and material obligation of the contract."

Mack vs. Rochester Ins. Co. 106 N. Y. 560–4.

The lower Federal courts have applied the general rule to cases where the language in the application and the reference to and incorporation of the application in the policy were like the one at bar and have specifically distinguished the Moulor case in

Provident Savings Life Insurance Co. vs. Llewellyn, 58 Fed. 940;
Brady vs. U. S. Life Ins. Co. 60 Fed. 727;
Kelley vs. Mutual, etc., Ins. Co. 75 Fed. 637;
Hubbard vs. Mutual, etc., Co. 100 Fed. 721.

And so have the State courts.

Provident Savings Life Ins. Co. vs. Reutlinger, 58 Ark. 533;
Aloe vs. Mutual Reserve, etc., 147 Mo. 575;
Jackson vs. Union, etc., Ins. Co. 83 Maine, 182;
Weil vs. N. Y. etc., Ins. Co. 47 La. Ann;
Boyle vs. N. W. Mut. etc., 95 Wis. 318;
Dwight vs. Germania Ins. Co. 103 N. Y. 541.

We think that no further citation or argument is necessary to show that the assured warranted the truth of the statements set forth in the plea.

The second ground of demurrer to the first plea.

This ground is:

"2. It appears that plaintiff's testator stated his estimate of his own habits and that defendant waived any further disclosure touching the same."

This contention is founded upon the assertion that the court will look at all the papers, the policy, the application and the declaration to the medical examiner, in order to construe any one of these and to determine the rights of the parties; that in the declaration to the medical examiner in this case the following questions were answered (or unanswered,) thus:

"14a. Do you drink wines, spirits or malt liquors daily or habitually?"

Answer. "No habit of drinking liquors."

"14b. If so, which of them and to what extent daily?"

Answer. . . ..(transcript, page 19 at bottom;)

that the defendant did not insist upon an answer to this last question and by failing to do so, accepted the opinion of A. S. Maclean that he had no habit of drinking liquors and under the decision of Raddin vs. Phœnix Ins. Co. 120 U. S., waived any disclosure of facts which would have shown that opinion to be erroneous: and that the questions and answers (9a and 9b) which were alleged to be untrue are analagous and the same effect as to these must given to such waiver.

This is a total misapplication of the doctrine of the Raddin case. In that case there were included in one division of the policy four questions. The answer given was complete and full as to one of them and did not purport to answer the others, and the court held that a failure to require a further answer to these others was a waiver of the right of the company to insist that they were unanswered, and that the want of an answer was a concealment which avoided the policy.

In the case at bar the question was two-fold, Do you drink wine, etc., daily? Do you drink wine, etc., habitually? The first branch of the question was left unanswered and the failure of the insurer to insist upon an answer precludes it from relying upon the failure to answer. But the second question was fully answered by an emphatic declaration "no habit of drinking liquors" This was a distinct assertion of fact and its untruth (as alleged in the plea) avoided the policy.

The fact that the assured did not answer the second question is entirely immaterial, for the question was intended to be answered only if the assured admitted that he drank daily or habitually. He admitted neither of these but denied that he had a habit and it would have been senseless to pursue an inquiry as to what extent he had a habit when he had said he had no habit at all.

Nor is the failure to require an answer to question B and a failure to push the assured as to what his idea of a habit was an acceptance of his own opinion of what constituted a habit of drinking liquors and a waiver of the right on the part of the insurer to insist that habit *vel non* was a question of fact to be judged by a judicial tribunal and not by the opinion of the assured. The insurer asked what as a

matter of fact his habit was and he answered that as a matter of fact he had no habit. There was no intimation in the policy or elsewhere that he was to state only his opinion or estimate, but a clear provision that his answer to this, as to all the other questions, must be full, complete and true.

The third ground of demurrer to the first plea.

This is:

"3. It appears that defendant left the matter inquired about to be answered according to plaintiff's testator's opinion and it does not appear that said testator did not state his honest opinion."

This raises no question different from that just discussed and we do not further pursue it.

The fourth ground of demurrer to the first plea.

This is:

"4. It does not appear that the defendant in issuing the said policy relied upon the answers of said testator to the said questions."

The idea in this demurrer and in the demurrer hereinafter to be discussed is that it must appear affirmatively from the declaration that the insurer relied upon, i. e., was induced, by the answers of the insured to issue the policy. The answer to this is obvious; that if the answer be a warranty, as we think we have shown, it became a part of the contract and, of course, it is not necessary for a plaintiff suing for a breach of a contract to allege that he was induced to enter into it by the assumption of a contractual obligation by the other party. The one contract is the consideration for the other and if the consideration appear upon the face of the contract itself it is not necessary to allege it. In this case the plea alleges that the insured offered the answer as "consideration" for and "as the basis of the contract." In no case is it necessary in a suit on a contract to show why either contracting party was induced to enter into it.

Even though this answer was a representation it would be presumed that it induced a reliance upon it by the insurer, as we shall hereafter show, but since this is a plea of warranty and since the question arises upon a subsequent plea of representation, we do not discuss this phase now, but defer it.

The fifth and sixth grounds of demurrer to the first plea.

These are:

"5. It appears that in issuing said policy the defendant did not rely upon the answers of said testator to said questions."

"6. It appears that the said defendant is estopped from making the said defense, because it appears that the said testator was advised by defendant, or by its procurement, that his answers would not be taken as a basis for the issuance of the said policy; but yet that the policy was issued by defendant and premiums therefor received by it from said testator; and, hence defendant will not be permitted to avoid its liability upon said policy upon the ground that said answers were untrue, without alleging that said testator was informed that the policy was issued on the faith of said answers."

These are practically the same and mean, as shown by the argument of the counsel for the in-ured in the court below, that the insurer showed affimatively by its own declaration that it would not accept the statement of the insured that he drank moderately.

This declaration is found in the declaration to the medical examiner immediately after questions "14a and 14b" (transcript p. 13,) and is as follows:

"Note. State the daily amount. General terms such as "temperately," "moderately," "occasionally," will not be accepted and will necessitate correspondence."

From this the plaintiff drew the conclusion that since the insurer declared that it would not accept such statements, it was equivalent to a declaration that it would not rely upon them and that it was immaterial whether they were true or not true

No such construction can be properly given. This note was an instruction to the medical examiner to whom these answers were made and it was an admonition to him that time would be wasted by further correspondence if he failed in the first instance to procure specific answers. If in fact, however, a general answer was given and in fact accepted by the insurer, it was entitled to rely upon the warranty that such statement was "true, full and complete."

Assignments Number Two and Three.

The second assignment is:

"That the court erred in sustaining the demurrer to the plea numbered 3, filed January 28th, 1901."

The third plea referred to in the assignment is as follows:

"3. That in the application mentioned in the first plea containing the warranty therein mentioned, the said Alexander S. Maclean was asked questions numbered 9a and 9c, to-wit:

"9a. Do you drink wines, spirits or malt liquors?"

"9c. Have you ever used them freely or to excess?"

To the question 9a he answered, "Yes." And to the question 9c he answered, "No."

The defendant avers that the said answer to the said question 9c was not true, full and complete, because, prior to the making of the said answer, he had a habit of using spirits to excess."

The third assignment is:

"That the court erred in sustaining the demurrer to the plea numbered 23, filed March 15th, 1901."

The twenty-third plea referred to therein is as follows:

"23. That at the time of the making of the application (a copy of which is attached to the declaration,) the said Alexander S. Maclean made to the medical examiner of the defendant certain statements and answers which are contained in the written declaration made by him to the said examiner, a copy of which declaration is attached to the amended declaration of the plaintiff, that by said written declarations and the application and the policy, the said statements made by the said Maclean became and were warranties, that one of the questions in said declaration was as follows, to-wit:

"14a. Do you drink wine, spirits or malt liquors daily or habitually?"

To this question the said A. S. Maclean answered. "No habit of drinking liquors."

The defendant avers that said answer was not true, because the said A. S. Maclean did have at the time of making the same a habit of drinking liquors, to-wit, spirits."

The demurrer to each is the same as that set forth in full in

the argument upon the preceding assignments and is found on page 23 of the transcript.

The argument upon these assignments is the same as upon the first. The character of the questions and answers in each, however, is such as to eliminate the argument for the defendant in error that the announcement of the insurer that general terms such as "moderately" was a declaration that if such answer should be made the insurer would not rely on it. In the pleas numbered 3 and 21 the answers of the assured were positive that he had never used the designated liquors "to excess" and that he had "no habit of drinking liquors" and there is no reason for a contention that the insurer did not rely upon these positive denials.

Assignments Numbered Four and Five.

The fourth assignment is:

"That the court erred in sustaining the demurrer to the plea numbered 4, filed January 28th, 1901."

The fourth plea referred to in this assignment is as follows:

"4. That the defendant required of the said Alexander S. Maclean that he should prior to and as a condition of the issuance of the policy of insurance sued upon make and sign an application to this defendant for the issuance of the said policy. That he did make, sign and deliver to the defendant such application and offered therein the statements and answers in it contained as a consideration for and as the basis of the contract with the defendant under any policy issued under the said application. A copy of said application is annexed to the declaration. That by the terms of the policy of insurance sued on the said application became a part of the said contract of insurance.

That in and by said application the said Alexander S. Maclean represented that the statements and answers in said application were true, full and complete. That in answer to question 9a in said application, to-wit:

"9a. Do you drink wines, spirits or malt liquors?" He answered, "Yes." And in answer to question 9b in said application, to-wit:

"9b. If so, which of these and to what extent?" He answered, "Moderately."

The defendant avers that said answers were not true, full and complete because at the time that he made said answer

he had a habit of drinking spirits more than moderately, and that the existence or non-existence of the said habit was material to the risk assumed by defendant, upon the life of the said Alexander S. Maclean."

Assignment No. 5 is:

"That the court erred in sustaining the demurrer to the plea numbered 6, filed January 28th, 1901."

The sixth plea referred to in this assignment is:

"6. That in the application mentioned in the fourth plea containing the representations therein mentioned the said Alexander S. Maclean was asked questions numbered "9a" and "9c," to-wit:

"9a. Do you drink wines, spirits or malt liquors?"

"9c. Have you ever used them freely or to excess?"

To the question "9a" he answered, "Yes."

To the question "9c" he answered, "No."

The defendant avers that the said answer to the said question "9c" was not true, full and complete because prior to the making of the said answer the said Maclean had a habit of using spirits to excess and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander S. Maclean."

The demurrers to each of these is the same as the demurrer to the first plea set set forth in argument upon assignment No 1, and is found in transcript, page 23.

This plea differs only in the reliance upon the untruth of different representations made by the assured and are pleas setting up as representations the same matter set up as warranties in the pleas already discussed.

The arguments already made apply to them, but the counsel for plaintiff in the court below contended there, and probably will here, that the pleas were additionally defective because:

1. They rely upon the untruth of representations but fail to allege that such representations induced the insurer to issue the policy. And

2. That the allegation that such representations were material was a conclusion of law and therefore not good, and that it was incumbent upon the defendant to show the manner in which the representations were material.

1. As we read the law if a statement not a part of a contract be voluntarily offered by one party to induce the other

to enter into the contract the party relying upon the untruth of such statement as an answer to an action based upon his breach must allege and prove that he was induced by such untrue statement to enter into the contract, but when he makes inquiry of the other party about matters connected with the contract and receives answers to such inquiries, he will be presumed to have relied upon, and to have been induced by, such answers.

Cook vs. Finkler, 9 Mich. 131–133.

The inducement in this case is found in the questions and answers in the application and accompanying papers, which are made a part of the declaration and pleas and it was unnecessary to allege formally any inducement.

2. The question of materiality is closely akin to the question of inducement, for, as most of the following authorities show, that is material which influences the insurer in making up its mind whether it will or will not enter into the contract.

These pleas allege that the representations made by the assured in the application were material. The plaintiff demurring says that this was pleading a conclusion of law. This may be true, but even if so the plea was good, for upon the policy and the application and the declaration to the medical examiner, all attached to the declaration in this suit, materiality of the representations appeared as a matter of law.

As we understand the law determining the question as to when materiality of representation made in the obtaining of an insurance policy is a question of law for the court and when a question for the jury is as follows:

A. It is for the court;

X. When the parties have by the contract made the representation a part of the policy or the basis or consideration of it and stipulated that it is true. In such case, the parties have expressly and conclusively made it material.

This court has said on this subject:

"But the parties may by their contract make material a fact that would otherwise be immaterial or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject and whether such insurance has been applied for and refused are material facts, at least when statements regarding them are required by the insurers as a part of the basis of the contract. * * *

"Where an answer of the applicant to a direct question of the insurer purports to be a complete answer to the question any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application."

Phœnix Life Ins. Co. vs. Raddin, pp. 189–190.

And this court has pointedly declared:

"This stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material, but as to all statements. The statements need not come up to the degree of warranties They need not be representations even, if this term conveys an idea of an affirmation having any technical character. "Statements and declarations" is the expression what the applicant states and what the applicant declares. * *

"The Company deems it wise and prudent that the applicant should inform it truly whether he has made any other application to have his life insured. So material does it deem this information that it stipulates that its liability shall depend upon the truth of the answer. The same is true of its inquiry whether the party is married or single. The company fixes this estimate of its importance. The applicant agrees that it is thus important by accepting this test. It would be a violation of the legal rights of the Company to take from it its acknowledged power thus to make its opinion the standard of what is material and to leave that point to the determination of a jury. The jury may say as the counsel here argues, that it is immaterial whether the applicant answers truly if he answers one way namely, that he is single or that he has not made an application for insurance. Whether a question is material depends upon the question itself. The information received may be immaterial. But if under any circumstances it can produce a reply which will influence the action of the Company, the question cannot be deemed immaterial."

Jeffries vs. Economical Mutual, &c., 22 Wall. 47;
Price vs. Phœnix, 17 Minn. 473, 490;
Aetna Life Ins. Co. vs. France, 91 U. S. 510;
Campbell vs. N. Y. Life, &c., 98 Mass. 403;

And authorities under next head.

Y. When the representation consists of a written answer to a written question touching the insurance and relevant thereto. In such case the parties have impliedly but conclusively made it material.

"The parties may by the frame and contents of the papers either by putting representation as to the quality, history or relations of the subject insured into the form of answers to specific questions, or by the mode of referring to them in the policy, settle for themselves that they shall be deemed material, and when they have done so, the applicant for insurance cannot afterwards be permitted to show that the fact which the parties have thus declared material to be truly stated to the insurer, was in fact immaterial, and thereby escape from the consequences of making a false answer to such a question."

"Although the particular nature of the assured's title in the property insured need not be stated unless inquired about by the insurers, yet a substantially untrue answer to a question put to him by them in relation to his title would avoid the policy without regard to the mode in which the application was referred to in the policy."

Campbell vs. New England, &c., 98 Mass. 401, 407;
Wilson vs. Conway, 4 R. I. 141, 156, *et seq.*;
Anderson vs. Fitzgerald, 4 House of Lords, 484;
Miller vs. Mutual, &c., Ins. Co. 31 Ia. 216, 232;
Price vs. Phœnix Mutual, &c., 17 Minn. 473, 490, 491;
Davenport vs. New England, &c, Co. 6 Cushing, 341;
May on Insurance, Sec. 185, *et seq*;
N. A. Fire Ins. Co. vs Thorp, 22 Mich. 166, 167;
Ryan vs. Springfield, &c., 46 Wis. 673, 674;
Clark vs. Manufacturers Ins. Co. 8 How. 247.

In this last case the distinction between the representation made by an answer to an inquiry and a concealment where no question is propounded, is clearly drawn.

Z. When the representation, though in neither of the forms mentioned is of such a nature and so related to the character of insurance required that the court can see that it naturally if not necessarily would have affected the insurers in determining whether to accept or reject the risk. For example: A representation in obtaining fire insurance that the property sought to be insured was not mortgaged when in fact it was, or that lamps were not used in a building sought to be insured when in fact they were; or, in a life policy, that the present residence was in the White Mountains when in fact it was in Vera Cruz, would be held by the court as a matter of law to be material.

"Whenever the nature of this interest would have or might have a real influence upon the underwriters either not to underwrite at all or not to underwrite except at a higher premium, it must be deemed material to the risk, and if so the misrepresentation or concealment of it will avoid the policy."

The Columbia Ins. Co. vs. Lawrence, 10 Pet. 516.

In that case there was a representation contained in the proposal but not in answer to an inquiry.

Columbia Ins. Co. vs. Lawrence, 2 Pet. 22, 48, 49;
Farmers Ins. Co. vs. Snyder, 16 Wend. 490;
Clason vs. Smith, 3 Wash. (C. C.) 159.

* * * * * * * * * * *

In all the foregoing cases the representations differ from warranties only in that the former need be only substantially true, while the latter must be literally true. In both, the materiality is not open to question or issue before a jury.

B. The question of materiality is for the jury in all cases where it has not been fixed by the parties and may depend upon considerations which may not be clear or as to the effect of which upon the insurer men may reasonably differ, or where the facts are not undisputed or perfectly plain:

Farmers Ins. Co. vs. Snyder, 16 Wend. 490;
Campbell vs. New England Ins. Co. 98 Mass. 402;
May on Ins. Sec. 184;

And *passim* authorities *supra*.

* * * * * * * *

In the case at bar, the truth of the representations was made material not only by the stipulations of the parties that they should be true and that they were the basis and offered as a consideration for the contract, but also by specific inquiries and answers. Besides, the habit of drinking liquors to excess was manifestly material to the risk and the Court would have so declared even though the representation had been volunteered and not embodied in the contract or in answers to any inquiries.

The Court below should then have held that as matter of law, the representations made by the assured as set forth in the pleas were material and should have overruled the demurrers to the pleas.

Assignments Number Six, Seven, Eight and Thirteen.

These assignments are, *seriatim*, as follows:

Assignment six is:

"That the Court erred in sustaining the demurrer to the plea numbered 7, filed January 28, 1901."

The 7th plea referred to is on page 19 of transcript, and is as follows:

"7. That, in the application mentioned in the fourth plea containing the representations therein mentioned, the said Alexander S. Maclean was asked questions "9a" and questions "9b," to-wit:

"9a. Do you drink wine, spirits or malt liquors?"

"9b. If so, which of these, and to what extent?"

To the question "9a" he answered, "Yes." And to the question "9b" he answered, "Moderately."

The defendant avers that the said answer was not true, full, and complete, because, at the time that he made the said answer, he had a habit of drinking spirits more than moderately, and that the existence or non-existence of the said habit was material to the risk assumed by defendant upon the life of the said Alexander S. Maclean, because a knowledge of such existence or non-existence would have materially influenced the judgment of the defendant in determining whether it would or would not issue the policy of insurance upon the life of the said Alexander S. Maclean."

Assignment seven is:

"7. That the Court erred in sustaining the demurrer to the plea numbered eight, filed January 28, 1901."

The plea numbered eight is in the transcript on page 20, and is as follows:

"That in the application mentioned in the fourth plea containing the representation mentioned, the said Alexander S. Maclean was asked question "9a" and question "9b," to-wit:

"9a. Do you drink wine, spirits or malt liquors?"

"9b. If so, which of these and to what extent?"

To the question "9a" he answered "yes." And to the question "9b" he answered "Moderately."

The defendant avers that the said answer was not true, full and complete, because at the time that he made said answer, he had a habit of drinking spirits more than

moderately, and that the existence or non-existence of the said habit was material to the risk assumed by defendant upon the life of the said Alexander S. Maclean, because a knowledge of such existence would materially influence careful and intelligent life insurance companies in determining whether to issue or to refuse to issue a policy of insurance on the life of the said Alexander S. Maclean."

Assignment eight is as follows:

"8. That the Court erred in sustaining the demurrer to the plea numbered nine, filed January 28, 1901."

The plea numbered nine is on page 20 of the transcript, and is as follows:

"9. That, in the application mentioned in the fourth plea containing the representation therein mentioned the said Alexander S. Maclean was asked question "9a" and question "9b," to-wit:

"9a. Do you drink wines, spirits or malt liquors?"

"9b. If so, which of these, and to what extent?"

To the question "9a" he answered "Yes." And to the question "9b" he answered, "Moderately."

The defendant avers that the said answer was not true, full and complete, because at the time that he made the said answer, he had a habit of drinking spirits more than moderately, and that the existence or non-existence of the said habit was material to the risk assumed by defendant upon the life of the said Alexander S. Maclean because the existence of such habit tended to injure the health and shorten the life of the said Alexander S. Maclean."

The demurrer to these pleas are the same as those to plea number one heretofore discussed, and are on page 23, of transcript.

Assignment number thirteen is:

"13. That the Court erred in refusing to deliver in charge to the jury the special instruction asked by the defendant, numbered nine, as set forth in the fifth exception of the bill of exceptions, to-wit:

"9. Any habit of drinking spirits by Maclean was material, if it was to such an extent that according to the course of practice of life insurance companies generally, it would have led to the rejection of the risk if it had been made known to defendant before the issuance of the policy."

The seventh and eighth pleas and the ninth instruction

present the question in its subjective aspect, that is, its effect upon the mind of the insurers.

The seventh plea presents it as to the effect upon the mind of the insurers in the particular case.

The eighth plea presents it as to the effect upon the minds of careful and intelligent life insurance companies.

The ninth instruction in the thirteenth assignment of error presents it as the usual effect upon life insurance companies generally, according to the course of practice of such companies.

The ninth plea presents it in its objective aspect as an actual effect upon the subject of insurance, the life of the assured, such effect being judged of by the jury.

We are clear that the ninth plea did not present the proper definition of materiality, but it was offered because the Court had pronounced bad the pleas seven and eight, and we desired to present to it every phase.

The question as to what constitutes materiality has been touched upon so frequently in the cases hereinbefore cited by us, that we content ourselves with adding thereto the full and able discussion thereof and citation of authority by Judge Taft, speaking for the Circuit Court of Appeals of the Sixth Circuit. Under that decision, and we believe under the better decided cases, the seventh plea and the ninth instruction are good, and the Court erred in not so holding.

Provident Mutual, &c, vs. Mechanics, &c., 72 Fed. 423, 430.

Assignment Number Eighteen.

This assignment is as follows:

"18. That the Court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered eleven, as set forth in the tenth exception of the bill of exceptions, to-wit:

"11. The Court instructs you that in cases where the question of temperance or intemperance is involved, there is no sharp line of distinction, and in reference to that much is left to the discretion and judgment of the jury; and in connection therewith the jury is authorized to consider the reasonable understanding and the belief of the assured."

The tenth exception therein referred to is on page 59.

It is too well settled to require citation of authority that when there is a direct representation of a fact by the assured, the assertion must be true, regardless of the belief or honesty of the insured in making such assertion. and if untrue, the policy will be avoided.

The Court below ignored this rule of law, however, and charged the jury in the instruction under consideration that they were "authorized to consider the reasonable understanding and belief of the assured."

In so doing, it clearly erred.

Assignment Number Twenty-Two.

This assignment is as follows:

"22. That the Court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered eighteen, as set forth in the fourteenth exception of the bill of exceptions, to-wit:

"18. The law is, and the Court so instructs you, that when an insurance company issues a policy without requiring an answer to an interrogatory contained in the application or declaration made in connection therewith, it is fair and you have a right to infer that the company waived information upon that point."

The fourteenth exception referred to in this assignment is found on page 60 of the transcript.

The Court erred in giving this instruction:

Because, as we have seen upon a proper construction of the policy and the accompanying papers, there was no omission of the insurers to require an answer to any question from which could be iuferred a waiver of information, and

Because, it was for the Court and not for the jury to inspect and construe the policy and determine whether there was or was not a waiver.

Respectfully submitted,

W. A. BLOUNT,

Attorney for Plaintiff in Error.

APPENDIX.

CHAPTER 4173—(59.)

AN ACT in Relation to the Liability of Life Insurance Companies and Fire Insurance Companies in the State of Florida.

Be it Enacted by the Legislature of the State of Florida:

SECTION 1. That upon the rendition of a judgment or decree by any of the courts of this State against any life or fire insurance company, in favor of the holder or holders of any policy of insurance written by such company, there shall be adjudged or decreed against such insurance company, and in favor of the holder or holders of such policy, a reasonable sum as fees and compensation for his or their attorneys or solicitors prosecuting the suit in which the recovery is had.

SEC. 2. That the amount to be recovered for fees and compensation for attorneys and solicitors against life or fire insurance companies, as provided in the foregoing section, shall be ascertained and fixed by the court in chancery causes, or a jury in common law actions, from testimony adduced for that purpose, and shall be included in the judgment or decree rendered against such companies.

SEC. 3. All laws and parts of laws in conflict with the provisions of this Act, be and the same are hereby repealed.

SEC. 4. That immediately upon the approval of this Act the Treasurer of the State shall send a copy of this Act to each fire insurance company doing business in this State.

Approved June 2, 1893.